No. 2016.

IN THE

United States Circuit Court of Appeals

NINTH JUDICIAL CIRCUIT

EMERY VALENTINE,

Plaintiff in Error,

vs.

M. J. HYNES, as Administrator of the Estate of J. J. McGrath, Deceased, and S. HIRSCH,

Defendants in Error.

BRIEF FOR THE DEFENDANTS IN ERROR AND PRAYER FOR DISMISSAL OF WRIT OF ERROR.

R. F. LEWIS,
Attorney for Defendants in Error.

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Before discussing the merits of this case we desire to call attention to the fact that the proper method of bringing the matter before this Court has not been followed.

While it is true that the action as originally commenced was in ejectment, it is also a fact that the defendant below in addition to his answer filed a cross-complaint (Trans., p. 14), wherein he seeks to secure equitable relief against the plaintiff. The plaintiff answered the issues tendered by this cross-complaint (Trans., p. 57) and by so doing and not objecting in

any way submitted himself to the jurisdiction of the equity side of the Court.

> *O'Hara v. Parker*, 39 Pac. 1004, at 1007 (Oregon).

The Court in rendering judgment recognized the fact that equity had taken jurisdiction, for it was adjudged that the parties each pay their own costs and also that the plaintiff be enjoined from claiming or entering into possession of a portion of the premises in controversy. (Trans., pp. 76-77.) The legal issues presented in the trial below were with two exceptions adjudicated in favor of the plaintiff in error and his appeal is directed mainly toward a reversal of the decision of the Court enjoining him from attempting to take possession of a portion of the land in dispute and from the order requiring each party to assume his own costs.

If the Court will examine the record it can easily be seen that the equities in this case are with the defendant in error. It appears that many years before this action was commenced he had built a building on what he supposed was his own land, but as a matter of fact was in conflict with his neighbor, who was cognizant of the situation but failed to notify defendant. The areas in conflict are shown on the plat at page 72 of the Transcript. After defendant's building had been constructed a patent for the townsite of Juneau was issued and each person in possession of property in the townsite was required to file an application covering the land actually occupied by him at the date of the townsite entry. Through an error of his surveyor

the defendant failed to properly describe the land occupied by him, with the result that the plaintiff received title to the portions of land under defendant's buildings, which are shown on the plat in pink. (Trans., p. 72.)

Some nine years after the plaintiff had secured his title to the conflicting parcels he commences an action in ejectment, claiming damages to the amount of $1500, and asking for a restitution of the premises.

This is the second time the cause has been before this Court and we ask that this writ of error be dismissed and the litigation ended, on the ground that the plaintiff in error should have brought the cause to this Court by appeal instead of by writ of error.

R. F. LEWIS.
Attorney for Defendants in Error.

BRIEF ON THE MERITS.

Ejectment brought by the plaintiff Emery Valentine to recover certain portions of several lots in Juneau, Alaska. The defendant McGrath answered and also filed a cross-complaint for the purpose of securing equitable relief. The plaintiff answered the defendants' cross-complaint.

The property in controversy herein is shown on the plat at page 72 of the Transcript.

The plaintiff sued for all of lots one (1), two (2) and three (3) in block three (3) and a portion of block "G" as shown on the plat. Judgment was given for the plaintiff only for the portions indicated by the pink coloring on the plat, and excepting the portion in

pink near the lower edge of the plat and marked "cornice."

The plaintiff in error has assigned error on four grounds: The first is that the Court erred in not awarding to the plaintiff the property described in plaintiff's third cause of action (Trans., p. 5), being that portion marked "cornice" on the plat. The action of the Court was entirely justifiable in our opinion for the following reason:

On the first trial of this cause in the Court below, on motion of the plaintiff Valentine, this third cause of action was dismissed as appears in the Transcript of the record in said cause on file with this Court, the case having been before this Court on a writ of error taken by the defendant J. J. McGrath.

(See Transcript cause No. 1610, *J. J. McGrath et al.* v. *Emery Valentine,* motion by plaintiff Valentine to dismiss as to third cause of action, page 17, judgment of dismissal, pages 19-20.)

There is nothing in either of the records before this Court to show that this judgment of dismissal as to the third cause of action has ever been set aside or modified in any way.

In the former appeal in this case neither the defendant McGrath nor plaintiff Valentine appealed from the judgment of dismissal as to the third cause of action, and so the same became final.

The fact that on the retrial of the case below the same pleadings were used as on the trial in the former case would not serve to set aside the judgment which appears in the records before this Court.

On page 14 of the plaintiff's brief we find the following language:

> "Both parties proceeded upon the theory that the premises in question were still in controversy and both sides presented evidence in full upon their respective titles."

The foregoing statement is not justified, for there is nothing in the record before this Court to indicate that such was the case. The only testimony to be found in the Transcript being that relating to the rental value of the property in controversy. (Trans., pp. 79-86.)

It was held in *Darling* v. *Polack,* 18 Cal. 625, as follows:

> "In effect a dismissal is a final judgment in favor of the defendants, and although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceedings in the particular action the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits."

See, also,

Leese v. *Sherwood,* 21 Cal. 151.

The second assignment of error covers that portion of the judgment of the Court below dealing with the small triangle of ground lying at the southeast corner of lot one (1) in block three (3), as shown on the plat at page 72 of the Trancript, and described in plaintiff's first cause of action. (Trans., p. 3.)

We are inclined to agree with the plaintiff in error on most of the points which he makes in support of this assignment of error, and the only ground under the

findings of the Court on which the judgment as entered can be supported is that on account of the small area involved, the Court might be justified in applying the doctrine *de minimis non curat lex.*

As to the third assignment of error it seems clear that the Court below was entirely justified in awarding only nominal damages. But before discussing the merits of this assignment we desire to call attention to the fact that the so-called bill of exceptions covering pages 78-88 of the Transcript should not be considered as a part of the record for the following reason:

The time within which the trial judge was authorized to settle a bill of exceptions in the case had expired long before any step was taken by the plaintiff in error.

The judgment was entered June 21, 1910 (Trans., p. 77.) The bill of exceptions was signed and settled June 3, 1911. There is nothing in the record to indicate that any order extending the time had ever been made and no waiver or stipulation appears to have been made by the defendants in error. As this is an appeal from a judgment involving issues of an equitable nature we contend that the rule announced in *Dalton* v. *Hazelet,* 182 Fed. 560, applies:

> "Carter's Alaska Code, section 372, providing that exceptions prepared and settled shall be filed with the clerk within ten days from the entering of the decree or such time as the court may allow, exceptions not filed with the clerk until more than six months after the entering of the decree without an order extending the time were nugatory."

In spite of the arguments and explanations of the

plaintiff in error, the fact remains that he commenced an action claiming the greater portion of the land on which the building of the defendant in error McGrath stands (Trans., p. 4, par. 1), and the Court did not award to the plaintiff in error all of the land which he sought to recover. The Transcript, pages 79 to 86, contains the evidence on which the plaintiff in error attempted to establish the amount of damages to which he was entitled. There is no testimony in the record which shows definitely or even approximately what the rental value of the ground awarded the plaintiff amounted to. The only witness who testified was the plaintiff himself, and his testimony was to the effect that property in the vicinity had a certain rental value per front foot; also that cabins on lands similar to a portion of the land in controversy were rented by him at a certain figure.

In view of the absence of any positive testimony showing the value of the land in dispute or its rental value, the Court was entirely justified in awarding only nominal damages.

As the cause was tried before the Court alone, a jury having been waived, the finding of the Court as to the rental value has the same force and effect as the verdict of a jury.

Carter's Alaska Code, chapter 19, section 210, page 186, reads as follows:

> "The order of proceedings on a trial by the Court shall be the same as provided in trials by jury. The finding of the Court upon the fact shall be deemed a verdict, and may be set aside

> in the same manner and for the same reasons, as far as applicable, and a new trial granted."

It follows that so long as there was any basis at all on which the Court below made its finding, the same will not be disturbed on appeal. This question has been decided so often by this Court that a citation of authorities is unnecessary.

The fourth assignment of error deals with the matter of costs. The plaintiff in error argues that costs should have been awarded him as a matter of course. His position in this regard would have been stronger had the Court awarded him all the land which he sought to recover; this, however, the Court did not do. Furthermore, the controversy before the Court below was not merely an action at law in which the plaintiff sought restitution of the premises in controversy, but by reason of the cross-complaint of the defendant below the case was brought within the jurisdiction of the equity side of the Court. (Trans., p. 14.) The plaintiff below answered the issues (Trans., p. 56) tendered by the cross-complaint and thus waived any objection to the exercise of equity jurisdiction by the Court.

O'Hara v. *Parker,* 39 Pac. 1004, at 1007.

Chapter 52, part 4, page 254, Carter's Alaska Code, section 514, reads as follows:

> "In an action of an equitable nature costs and disbursements shall be allowed to a party in whose favor a judgment is given in like manner and amount as in other actions without reference to

> the amount recovered or the value of the object of the action, *unless the Court otherwise directs.*" (Italics ours.)

The above section is identical with section 554 of Hill's Oregon Code, which has been construed in *Cole* v. *Logan,* 33 Pac. 568, at 571.

The Court say:

> "This (meaning the above provision) invests the trial Court with discretion in the taxation of costs and disbursements, and such discretion will not be reviewed except for an abuse thereof."

We submit that under the circumstances shown in this case there was no abuse of discretion on the part of the Court below, and call attention to finding of fact No. 10 (Trans., p. 69, bottom), as follows:

> "The Court further finds that there is a two-story building costing about $4000 standing upon defendant's ground and which encroaches upon and covers that portion of Lot One (1) in Block One (1) (should be Block 3 note) in controversy herein; that at the time of the erection of the building no notice was given the owner of this small encroachment but the building was permitted to be completed without objection."

On page 15 of plaintiff's Brief the language quoted above is amplified so that it appears that the question of notifying the defendant had been considered by plaintiff's predecessor in title, thus showing conclusively that although he knew of the situation he stood by and allowed the defendant in error who was in ignorance of the encroachment to erect his building. After a

lapse of almost ten years the plaintiff brings this action seeking to recover a large sum as damages for the withholding of these insignificant little pieces of ground.

Respectfully submitted,

R. F. LEWIS,
Attorney for Defendants in Error.